

***China – Measures Affecting Trading Rights and Distribution Services
for Certain Publications and Audiovisual Entertainment Products***

(WT/DS363)

Other Appellant Submission of the United States of America

October 7, 2009

***China – Measures Affecting Trading Rights and Distribution Services
for Certain Publications and Audiovisual Entertainment Products***

(WT/DS363)

SERVICE LIST

OTHER APPELLEE

H.E. Mr. Sun Zhenyu, Permanent Mission of the People's Republic of China

THIRD PARTIES

H.E. Mr. Peter Grey, Permanent Mission of Australia

H.E. Mr. Eckart Guth, Permanent Delegation of the European Commission

H.E. Mr. Shinichi Kitajima, Permanent Mission of Japan

H.E. Mr. Lee Sung-joo, Permanent Mission of Korea

Mr. Yi-Fu Lin, Permanent Mission of the Separate Customs Territory of Taiwan, Penghu,
Kinmen and Matsu

TABLE OF CONTENTS

TABLE OF REPORTS.	ii
TABLE OF ABBREVIATIONS.	iii
I. INTRODUCTION AND EXECUTIVE SUMMARY.....	1
A. Introduction.	1
B. Executive Summary.....	1
II. FACTUAL AND PROCEDURAL BACKGROUND.....	5
III. ARGUMENT.....	9
A. Introduction.	9
B. The Panel’s Two-Step Approach to Article XX(a) of the GATT 1994.....	9
C. The Panel’s First-Step Analysis of the State Plan Condition Misinterpreted and Misapplied Article XX(a) of the GATT 1994.	11
D. In the Alternative, the Panel’s Analysis of the State Plan Condition Did Not Constitute an Objective Assessment of the Matter.	20
IV. CONCLUSION.	21

TABLE OF REPORTS

Short Form	Full Citation
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
<i>U.S. – Customs Bond Directive</i>	Appellate Body Report, <i>United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , WT/DS343/AB/R, WT/DS345/AB/R, adopted 1 August 2008
<i>U.S. – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002
<i>U.S. – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009
<i>U.S. – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005
<i>U.S. – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001

TABLE OF ABBREVIATIONS

Abbreviation	Description
Accession Protocol	<i>Protocol on the Accession of the People's Republic of China, WT/L/432</i>
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
GAPP	General Administration of Press and Publication
GATS	<i>General Agreement on Trade in Services</i>
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
Panel Report	<i>Report of the Panel, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/R & Corr.1</i>
Publications Regulation	<i>Regulations on the Management of Publications, 2001 (Exhibit US-7)</i>
Working Party Report	<i>Report of the Working Party on the Accession of China, WT/MIN(01)/3</i>

I. INTRODUCTION AND EXECUTIVE SUMMARY

A. Introduction

1. When China acceded to the WTO, it made important commitments to liberalize trading rights, trade in services, and trade in goods related to films, home videos, publications and music.

The United States initiated this dispute because of serious concerns about problems in China's legal regime governing the importation and distribution of these copyright-intensive products.

2. In its report,¹ the Panel addressed critical problems challenged by the United States, finding that the major Chinese restrictions on the importation and distribution of the relevant products are inconsistent with China's WTO obligations.

3. A number of the Panel's findings are of great systemic importance, and many have helped to clarify China's obligations. Indeed, it is notable that China has not appealed many of the Panel's findings, and the United States looks forward to responding in its Appellee Submission to the arguments that China has raised on appeal.

4. At the same time, the United States submits this Other Appellant Submission in order to address one individual area of concern in the Panel Report.

B. Executive Summary

5. Article 42 of the *Regulations on the Management of Publications* ("Publications Regulation") provides, *inter alia*, that publication import entities for books, newspapers, periodicals and electronic publications can be approved only in conformity with an undisclosed State plan for the number, structure, and distribution of publication import entities (the "State plan condition" or "State plan requirement"). The Panel found the State plan condition to be

¹ Report of the Panel, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R & Corr.1 ("Panel Report").

inconsistent with paragraph 5.1 of the *Protocol on the Accession of the People’s Republic of China* (“Accession Protocol”)² and paragraphs 83(d) and 84(a) of the *Report of the Working Party on the Accession of China* (“Working Party Report”).³ China asserted that, notwithstanding any inconsistency with these obligations, this requirement in the Publications Regulation is justified by Article XX(a) of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”).

6. The Panel considered China’s asserted Article XX(a) justification on an *arguendo* basis. In analyzing that possible defense, the Panel made what may be considered an intermediate finding with respect to the State plan condition: “[I]n the absence of reasonably available alternatives, the State plan requirement in Article 42 of the Publications Regulation can be characterized as ‘necessary’ [within the meaning of Article XX(a) of the GATT 1994] to protect public morals in China.”⁴ The United States considers that this intermediate finding is in error.

7. The Panel divided its Article XX(a) analysis into two steps: first, whether China made a *prima facie* case that the measures at issue are “necessary” within the meaning of Article XX(a); and second, if appropriate, whether reasonably available and WTO-consistent alternatives have been identified. As a threshold matter, the United States has some concerns about this two-step approach. While the United States recognizes that the Panel drew on a statement made in a previous Appellate Body report, other reports have not suggested that the Article XX analysis or analysis under *General Agreement on Trade in Services* (“GATS”) Article XIV should follow a

² WT/L/432.

³ WT/MIN(01)/3.

⁴ Panel Report, para. 7.836.

rigid, one-step-at-a-time approach. The text of Article XX(a) of the GATT 1994 reads simply “necessary to protect public morals” and thus sets out a single criterion of “necessary,” not a multi-step analysis. A finding such as the one at issue here – that the State plan condition was “necessary” “in the absence of reasonable alternatives” – introduces, at a minimum, confusion with respect to the use of the term “necessary” since it appears to be being used in more than one sense.

8. Even taking the Panel’s two-step approach on its own terms, however, the United States does not agree with the Panel’s statement, at the conclusion of the first step of its analysis, that the State plan condition makes a material contribution to the protection of public morals in China.

9. First, although the Panel purportedly evaluated the State plan condition, it did not actually examine the State plan, because China declined to provide it. The absence of information about the contents of the actual State plan meant that the Panel was precluded from assessing whether (and if so, how) the State plan makes a material contribution to the achievement of China’s content review policy objectives. The Panel’s discussion of the State plan condition on the sole basis of China’s assertions, without examining the actual restrictions, could not have allowed it to properly weigh the contribution (if any) that the State plan condition made to achieving China’s objectives.

10. Second, the Panel was aware that in 2006, there were 806 publishers of domestic books and electronic publications (who are required to conduct content review “in house”), almost twenty times more than the 42 approved state-owned publication import entities. China’s interest in ensuring and enhancing the quality and consistency of the content review of domestic

publishers can be no less than its interest in doing so for content review conducted by publication import entities. In light of the substantially greater number of content reviewers for domestic publications, the Panel could not consider that large numbers of content reviewers – or at least numbers much larger than the current number of approved publication import entities – undermine the consistency or quality of content review, or the performance of that review to China’s standards.

11. Third, the Panel failed to recognize that the requirement for publication import entities to have branches in a large number of customs areas contradicts the rationale given for limiting the number of importing entities. The fact that China compensates for a reduced number of publication import entities by increasing the number of actual import locations (and thus content review locations) per entity significantly undermines the alleged benefits that the Panel considered to flow from limiting the number of publication import entities and makes clear that limiting the number of publication import entities does not contribute to achieving China’s public morals objective in the way that the Panel asserted.

12. Fourth, the Panel asserted that a limitation on the number of publication import entities would allow China’s General Administration of Press and Publication (“GAPP”) to devote more time to conduct its annual controls, but it is not clear why this should be true. For example, even if the annual review involved a review of the actual publications imported, the total workload for the Chinese authorities would be a function of the total quantity of titles imported into China (not the number of publication import entities). Moreover, because each branch submits a report to GAPP, the work involved appears to be at least as much a function of the number of branches as a function of the number of legal entities approved as publication import entities.

13. In addition, the United States does not understand the reasoning behind the Panel’s statements minimizing the restrictive impact of the State plan condition on those wishing to engage in importing reading materials. The State plan condition is intended to limit the *number* of publication import entities. The State plan condition therefore appears to set a quota on the number of such entities, and such quotas are inherently restrictive.

14. In summary, there is no reason to consider the State plan condition “necessary” within the meaning of Article XX(a); in terms of the reasoning developed in *Korea – Various Measures Affecting Beef* and *U.S. – Gambling*, the limitations in the State plan condition are by no means closer to the “indispensable” pole than the “contribution” pole. The Panel thus misapplied Article XX(a) of the GATT 1994 in this particular finding (without prejudice to whether that Article is applicable or provides a defense for China in this dispute).

15. The United States considers that the flaws in the Panel’s analysis constitute misinterpretation and misapplication of Article XX(a). However, to the extent that the Panel’s disregard of significant facts relating to the State plan condition could be considered an error in the appreciation of evidence, its analysis of this issue would also fail to constitute an objective assessment of the matter and would thus be inconsistent with Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”).

II. FACTUAL AND PROCEDURAL BACKGROUND

16. On November 27, 2007, the Dispute Settlement Body established the Panel whose report is the subject of these proceeding before the Appellate Body. As relevant to this other appeal by the United States, the matter before the Panel included a claim that Articles 41 and 42 of the Publications Regulation are inconsistent with China’s obligations under paragraphs 5.1 and 5.2

of the Accession Protocol, as well as China’s obligations under paragraph 1.2 of the Accession Protocol, which incorporates, *inter alia*, the commitments given by China in paragraphs 83 and 84 of the Working Party Report.

17. Paragraphs 5.1 and 5.2 of the Accession Protocol, as well as paragraphs 83 and 84 of the Working Party Report, contain China’s commitments on “trading rights.” In general terms, paragraph 5.1 provides that “all enterprises in China shall have the right to trade in all goods throughout the customs territory of China,”⁵ and defines the right to trade as “the right to import and export goods.” Paragraph 5.2 of the Accession Protocol and paragraphs 83 and 84 of the Working Party Report contain additional commitments regarding trading rights, including a commitment to accord foreign individuals and enterprises treatment no less favorable than accorded to Chinese enterprises with respect to trading rights, commitments to grant trading rights in a non-discriminatory and non-discretionary way, and a commitment that any requirements for obtaining trading rights would be for customs and fiscal purposes only.

18. Articles 41 and 42 of the Publications Regulation impose limitations on which individuals and entities are permitted to import reading materials – that is, newspapers, books, periodicals, and electronic publications – into China.⁶ Article 41 provides that the business of

⁵ This obligation is subject to a phase-in period and a reservation of certain categories of goods to state trading, neither of which applies to the U.S. claims in this dispute, and is subject as well to the “without prejudice” clause at the beginning of paragraph 5.1.

⁶ The Panel found that under Article 2 of the Publications Regulation, the term “publications” includes audiovisual products, including sound recordings, as well as reading materials. Panel Report, para. 7.390. However, the Panel also found that by virtue of Article 67 of the Publications Regulations, Article 42 would not apply to importation of audiovisual products; a different measure would apply instead. Panel Report, para. 7.413.

importing publications must be carried out by approved publication import entities.⁷ Article 42 sets out the conditions under which an entity can be approved to become a publication import entity. In addition, Article 42 provides that “[a]pproval to establish a publication import entity shall not only be in compliance with the conditions listed in the preceding paragraphs, but also conform to the State plan for the total number, structure and distribution of publication import entities.”⁸

19. The Panel found that the following conditions and requirements in Articles 41 and 42 are inconsistent with China’s trading rights commitments:

- The condition that publication import entities must be state-owned enterprises, which the Panel found to be inconsistent with paragraph 5.1 of the Accession Protocol and paragraphs 83(d) and 84(a) of the Working Party Report;⁹
- The condition that publications must maintain a suitable organization and qualified personnel, which the Panel found to be inconsistent with paragraph 5.1 of the Accession Protocol and paragraphs 83(d) and 84(a) of the Working Party Report;¹⁰
- The condition that publication import entities can be approved only in conformity with the undisclosed State plan for the number, structure, and distribution of publication import entities (the “State plan condition” or “State plan requirement”), which the Panel

⁷ Panel Report, para. 7.392. In the same paragraph the Panel also found that only entities, not individuals, can be approved to import publications into China as “publication import entities.”

⁸ Panel Report, para. 7.392.

⁹ Panel Report, paras. 7.398, 7.401, and 7.706.

¹⁰ Panel Report, paras. 7.411 and 7.706.

found to be inconsistent with paragraph 5.1 of the Accession Protocol and paragraphs 83(d) and 84(a) of the Working Party Report;¹¹ and

- The designation requirement in Article 41, which the Panel found causes China to exercise discretion in the grant of trading rights and is therefore inconsistent with paragraph 84(b) of the Working Party Report.¹²

20. The effect of the conditions and requirements listed above is that no foreign-invested enterprises or foreign individuals can import publications into China. Only 42 firms import reading materials into China, and they are all wholly state-owned.¹³

21. China has not appealed any of the findings listed in paragraph 19.

22. Before the Panel, China asserted that, notwithstanding any inconsistencies with its trading rights commitments, the Publications Regulation is justified by Article XX(a) of the GATT 1994. The Panel ultimately rejected this defense,¹⁴ and China has appealed that finding.

23. In analyzing China's defense under Article XX(a), the Panel made what may be considered to be an intermediate finding with respect to the State plan condition under the first step of its analysis: "[I]n the absence of reasonably available alternatives, the State plan requirement in Article 42 of the Publications Regulation can be characterized as 'necessary' [within the meaning of Article XX(a) of the GATT 1994] to protect public morals in China."¹⁵

¹¹ Panel Report, paras. 7.411 and 7.706.

¹² Panel Report, paras. 7.436 and 7.706.

¹³ U.S. First Written Submission, para. 42 n.26.

¹⁴ Panel Report, paras. 7.911 and 7.913.

¹⁵ Panel Report, para. 7.836.

For the reasons described in this submission, the United States considers that this intermediate finding is in error.

III. ARGUMENT

A. Introduction

24. The Panel considered China’s Article XX(a) defense on an *arguendo* basis, drawing on the approach of the Appellate Body in its report in the *U.S. – Customs Bond Directive* dispute. In particular, the Panel decided to proceed as follows:

[W]e will proceed on the assumption that Article XX(a) is available to China as a defence for the measures we have found to be inconsistent with its trading rights commitments under the Accession Protocol. Based on that assumption, we will examine whether the relevant measures satisfy the requirements of Article XX(a). Should we find that this is the case, we would revert to the issue of whether Article XX(a) can, in fact, be directly invoked as a defence to a breach of China’s trading rights commitments under the Accession Protocol.¹⁶

Because the Panel ultimately found that China’s measures (including, as relevant to this appeal, Articles 41 and 42 of the Publications Regulation) did not satisfy the requirements of Article XX(a), the Panel declined to make a finding of whether or not Article XX(a) of the GATT 1994 can be invoked as a defense to an inconsistency with China’s trading rights obligations.¹⁷

B. The Panel’s Two-Step Approach to Article XX(a) of the GATT 1994

25. The Panel divided its Article XX(a) analysis into two steps:

[W]e now proceed to examine whether China has made a *prima facie* case that the measures at issue are “necessary” within the meaning of Article XX(a). If

¹⁶ Panel Report, para. 7.745.

¹⁷ Panel Report, para. 7.914.

appropriate, we will subsequently examine whether reasonably available and WTO-consistent alternatives have been identified.¹⁸

26. As a threshold matter, the United States has some concerns about this two-step approach.

The United States recognizes that the Panel referred to, and drew on, a statement made in the Appellate Body report in the dispute *Brazil – Retreaded Tyres*, in which the Appellate Body said:

[I]n order to determine whether a measure is “necessary” within the meaning of Article XX(b) of the GATT 1994, a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness. *If this analysis yields a preliminary conclusion that the measure is necessary*, this result must be confirmed by comparing the measure with possible alternatives¹⁹

Other reports, however, have not suggested that the Article XX analysis (or analysis under its counterpart in the GATS, Article XIV) should follow a rigid, one-step-at-a-time approach. For example, in paragraphs 306-307 of its report in *U.S. – Gambling* (a dispute in which, like this dispute, the Appellate Body considered a defense that the challenged measures were necessary to protect the public morals), the Appellate Body described a single “process” consisting of a number of possible lines of inquiry, and concluded that “[i]t is on the basis of this ‘weighing and balancing’ [of certain identified factors] and comparison of measures [*i.e.*, the challenged measure and possible alternatives], taking into account the interests or values at stake, that a panel determines whether a measure is ‘necessary’ or, alternatively, whether another, WTO-consistent measure is ‘reasonably available’.”²⁰

¹⁸ Panel Report, para. 7.793.

¹⁹ Panel Report, para. 7.786 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 178) (emphasis added).

²⁰ Appellate Body Report, *U.S. – Gambling*, para. 307 (quoting Appellate Body Report, (continued...))

27. This description of a single, integrated, yet multifaceted inquiry appears to the United States to hew closer to the text of Article XX(a) of the GATT 1994, which reads simply “necessary to protect public morals.” The text sets out a single criterion of “necessary,” not a multi-step analysis. A finding such as the one at issue here – that the State plan condition was “necessary” “in the absence of reasonable alternatives” – introduces, at a minimum, confusion with respect to the use of the term “necessary” since it appears to be being used in more than one sense.

C. The Panel’s First-Step Analysis of the State Plan Condition Misinterpreted and Misapplied Article XX(a) of the GATT 1994

28. Even taking the Panel’s two-step approach on its own terms, however, the United States does not agree with the Panel’s statement, at the conclusion of the first step of its analysis, that the State plan condition makes a material contribution to the protection of public morals in China. In this portion of its analysis, the Panel was evaluating the contribution that each of the conditions in Article 42 made towards achieving its objective of protecting public morals in China. The Panel stated that it was guided by the reasoning of the Appellate Body in its report in the *U.S. – Gambling* dispute (which in turn drew on the important report in the *Korea – Various Measures on Beef* dispute):

If the panel concludes that the respondent has made a prima facie case that the challenged measure is “necessary” – that is, “significantly closer to the pole of ‘indispensable’ than to the opposite pole of simply ‘making a contribution to’” –

²⁰ (...continued)
Korea – Various Measures on Beef, para.166).

then a panel should find that challenged measure “necessary” within the terms of Article XIV(a) of the GATS.²¹

29. In this case, however, the Panel’s conclusion concerning the State plan condition does not withstand close scrutiny. The State plan condition is not significantly closer to the pole of “indispensable” than to the opposite pole of “simply making a contribution.”

30. The Panel’s entire reasoning on this point is contained in the following sentences:

We understand China to contend that the requirement that approvals must be granted in accordance with its State plans for the number, structure and distribution of import entities is designed to ensure essentially two things: first, that only a limited number of import entities are approved, and, secondly, that each approved import entity has extensive geographical presence (distribution), through branches, in a large number of customs areas, and with branches located close to the entry points of imports into China.

With these introductory remarks in mind, we turn to consider the contribution made by the State plan requirement to the protection of public morals in China. Since in the case of the Publications Regulation the publication import entities are responsible for content review, we can see that limiting the number of import entities can make a material contribution. It would appear that with a limited number of publication import entities, it is easier for the GAPP to interact with these entities with a view to ensuring, and enhancing, the consistency of the review work of these entities. Similarly, a limited number of entities allows the GAPP to devote more time to conduct careful ex post controls of compliance with applicable content review requirements, e.g., through the annual inspections.²²

²¹ Panel Report, para. 7.785 (quoting Appellate Body Report, *U.S. – Gambling*, para. 310 (footnotes omitted)). See also Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

²² Panel Report, paras. 7.831-7.832. The United States also notes that in this first step of its Article XX(a) analysis of the State plan condition, the Panel proceeded on a critical assumption: It assumed China would maintain its requirement that only importing entities could conduct first-level content review – a requirement not contained in the State plan condition. (This assumption is expressed by the statement “[s]ince in the case of the Publications Regulation the publication import entities are responsible for content review. . . .”) It was only during the second step of the Panel’s Article XX(a) analysis that the Panel considered an alternative in which importing entities would *not* conduct content review. Panel Report, paras.

(continued...)

31. The *first* problem with the Panel’s analysis is that, although purportedly evaluating the State plan condition, it did not actually examine the State plan. When the Panel asked China for the plan, China replied that the State plan is not available in writing. Furthermore, the Panel expressly asked, “What are the State’s plans? Can China provide these plans to the Panel.” In response, however, China did not provide even the unwritten contents of the current (or any past or future) State plan. China simply restated that the plans “concern the quantity, geographical and product coverage of publication import entities.”²³

32. The absence of information about the contents of the actual State plan meant that both the United States and the Panel were precluded from reviewing the actual State plan and assessing its impact, and that the Panel was reduced to speaking in generalities. As a result, the Panel’s analysis effectively consisted of stating that a smaller number of publication import entities would mean a smaller number of entities for the authorities to interact with.²⁴ However, this statement was too general to help the Panel assess whether (and if so, how) the State plan makes a material contribution to the achievement of China’s policy objectives. That is, without the State plan, it is at best unclear how much (if at all) the actual limitation on the number of publication import entities would advance China’s content review objectives. In this connection, the United States recalls the Appellate Body’s reasoning in the *U.S. – Gambling* dispute:

We note, at the outset, that the standard of "necessity" provided for in the general exceptions provision is an *objective* standard. To be sure, a Member's

²² (...continued)

7.886-7.911. For the reasons that the United States will explain in its appellee submission, China’s criticisms of the Panel’s analysis of that alternative lack merit.

²³ China’s answer to Question 44 from the Panel.

²⁴ Panel Report, para. 7.832.

characterization of a measure’s objectives and of the effectiveness of its regulatory approach – as evidenced, for example, by texts of statutes, legislative history, and pronouncements of government agencies or officials – will be relevant in determining whether the measure is, objectively, “necessary”. *A panel is not bound by these characterizations*, however, and may also find guidance in the structure and operation of the measure and in contrary evidence proffered by the complaining party. *In any event, a panel must, on the basis of the evidence in the record, independently and objectively assess the “necessity” of the measure before it.*

[. . .]

It is well-established that a responding party invoking an affirmative defence bears the burden of demonstrating that its measure, found to be WTO-inconsistent, satisfies the requirements of the invoked defence. In the context of Article XIV(a), this means that the responding party must show that its measure is “necessary” to achieve objectives relating to public morals or public order. . . . [I]t is for a responding party to make a *prima facie* case that its measure is “necessary” *by putting forward evidence and arguments* that enable a panel to assess the challenged measure in the light of the relevant factors to be “weighed and balanced” in a given case.²⁵

33. In this dispute, China failed to put forward any evidence about the operation of the State plan condition. Instead, it limited itself to making general assertions. The Panel’s discussion of the State plan condition on the sole basis of those assertions, without examining the actual restrictions, could not have allowed it to properly weigh the contribution (if any) that the State plan condition made to achieving China’s objectives. The Panel thus did not properly determine whether the State plan condition was “necessary” in the sense that the Panel was using that term in this first step of its analysis (*i.e.*, closer to the pole of “indispensability” than to the pole of “contribution”).²⁶

²⁵ Appellate Body Report, *U.S. – Gambling*, paras. 304, 309-310 (footnotes omitted and emphasis added).

²⁶ Separately, it is troubling that China would still be applying a measure that is not
(continued...)

34. The *second* problem with the Panel’s reasoning is that the Panel failed to take account of the actual limit on the number of publication import entities in the State plan (because China did not disclose it). Consequently, the Panel could not know what China meant by a “limited number” of publication import entities, nor what rationale China may have used in the State plan to justify this limit. However, the Panel was at least aware of an important contrast between the number of publication import entities that have been approved and the number of Chinese publishers of books and electronic publications. In the same way that publication import entities are responsible for conducting content review of imported products, Chinese publishers are responsible for conducting content review of their own publications “in house.”²⁷ In 2006, there were 806 publishers of domestic books and electronic publications, almost twenty times more than the 42 approved state-owned publication import entities.²⁸ China’s interest in ensuring and enhancing the quality and consistency of the content review of domestic publishers can be no less than its interest in doing so for content review conducted by publication import entities. In light of the substantially greater number of content reviewers for domestic publications, it is unclear

²⁶ (...continued)

publicly available. The United States recalls that, as part of its accession to the WTO, China undertook to address this type of problem when it committed that “only those laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange that are published and readily available to other WTO Members, individuals and enterprises, shall be enforced.” Accession Protocol, para. 2(C)(1).

²⁷ See, e.g., Publications Regulations, Article 25 (“A publishing entity shall adopt a system of editorial responsibility to ensure that the contents of its publications conform to the provisions of these Regulations”) (Exhibit US-7); see also Second Written Submission of China, para. 128 (summarized in Panel Report, para. 4.459) (confirming the existence of this regime).

²⁸ Panel Report, para. 7.812. See also Oral Statement of the United States at the Second Substantive Meeting of the Panel, para. 30, and Exhibit US-98 (“Bulletin of Statistics,” General Administration of Press and Publication webpage (excerpt)).

how China could argue, or the Panel could consider, that large numbers of content reviewers – or at least numbers much larger than the current number of approved publication import entities – undermine the consistency or quality of content review, or the performance of that review to China’s standards.

35. The *third* difficulty with the Panel’s reasoning relates to the relationship between the numerical limitation on import entities and the extensive geographic presence requirement. The Panel failed to recognize that the requirement for publication import entities to have branches in a large number of customs areas and near points of entry for imports into China contradicts the rationale given for limiting the number of importing entities. In response to a question from the Panel, China was clear that one part of the content review of imported publications occurs at customs clearance.²⁹ Thus, the branches that conduct customs clearance must also be able to conduct content review.³⁰ In other words, while China appears to limit the number of legal entities that are authorized to act as publication import entities, it simultaneously expands the number (and location) of *actual content reviewers* beyond the limited number (and location) of approved entities by using branches that can cover many import locations. The fact that China

²⁹ China’s answer to Question 191 from the Panel (“When books, newspapers and periodicals reach customs, the importation entities will double check the content and at the same time conduct customs clearance. If any illegal contents are found, books, newspapers and periodicals with illegal contents will be stopped from customs clearance.”).

³⁰ In other contexts, China has also stressed the importance of conducting content review at the border, to prevent prohibited materials from entering Chinese commerce. *See, e.g.*, China’s answer to Question 188(b) from the Panel (“China submits that its policy of protecting public morals against inappropriate contents is based on the prevention of the dissemination of any good with prohibited content within China. Thus, a content review at the border, before the goods enter into China, would still be required in order to ensure that the imported good has the same content than the good which would have undergone review abroad.”).

compensates for a reduced number of publication import entities by increasing the number of actual import locations (and thus content review locations) per entity significantly undermines the alleged benefits that the Panel presumed to flow from limiting the number of publication import entities (such as easier interaction with importing entities to enhance consistency and more time to conduct annual inspections). This is further confirmed by an exhibit that China furnished to the Panel: According to the *Notice on Approving and Issuing License for Importing Publications and Carrying Out Annual Inspection System*, “if the importation entity of publications has branches in various regions, the branches shall submit annual inspection materials to the administration of press and publications at their locality before January 15 which shall formulate an examination opinion after reviewing [certain materials described in the notice].”³¹ Thus, the geographic distribution element of the State plan makes clear that limiting the number of publication import entities does not contribute to achieving China’s public morals objective in the way that the Panel asserted.³²

36. The *fourth* problem with the Panel’s analysis is that the Panel did not properly take into account the role of GAPP in content review. In particular, GAPP conducts ex post controls of publication import entities’ compliance with the Publications Regulation on an annual basis.³³

³¹ Exhibit CN-22, para. V(1).

³² In a separate paragraph, the Panel finds that the geographic distribution requirement, when considered independently from the numerical limitation, does not make a significant contribution to the protection of public morals in China. Panel Report, para. 7.833. The United States agrees with this finding.

³³ In fact, GAPP plays essentially two roles in content review. First, Article 45 of the Publications Regulation provides that every publication import entity must submit to GAPP (at the provincial level or above) a catalog of the publications that it plans to import, and that if GAPP (at the provincial level or above) finds any prohibited publication, it shall immediately

(continued...)

The Panel asserted that a limitation on the number of publication import entities would allow GAPP to devote more time to conduct its annual controls, but it is not clear why this should be true. In part, this is because China did not fully describe the nature of the annual inspections; without that information it is impossible to know how much of an additional burden (if any) is caused by an increase in the number of importing entities, and it is thus also impossible to assess whether any limitation on the number of importing entities is “necessary” to prevent that burden.³⁴ For example, even if the annual review involved a review of the actual publications imported, the total workload for the Chinese authorities would be a function of the total quantity of titles imported into China (not the number of publication import entities). Moreover, because each branch submits a report to the GAPP, the work involved appears to be at least as much a

³³ (...continued)

notify the publication import entity and the Chinese customs authority. Exhibit US-7; *see also* Panel Report, para. 7.765. The Panel does not suggest that a limitation in the number of entities makes any contribution at all to GAPP’s review of these catalogs, nor would there be any basis for such a suggestion; the amount of work involved relates to the total quantity of titles proposed to be imported into China at any given time, not to the number of entities submitting such catalogs. Second, while GAPP can examine an actual imported publication if it wishes to do so (pursuant to Article 44 of the Publications Regulation), it in fact appears from China’s first written submission that the importing entity has the first line of responsibility for content review upon importation (*see* China’s First Written Submission, paras. 147 and 149; *see also* Panel Report, para. 7.764). However, GAPP conducts ex post supervision of compliance on a yearly annual basis. Panel Report, para. 7.730; *Notice on Approving and Issuing License for Importing Publications and Carrying Out Annual Inspection* (Exhibit CN-22).

³⁴ For example, there was no consideration given to whether an increase in the number of GAPP inspectors could reasonably offset any such burden, nor whether the annual reviews for various publication import entities could be staggered throughout the year (according to paragraphs V(1) and V(2) of the *Notice on Approving and Issuing License for Importing Publications and Carrying Out Annual Inspection System*, (Exhibit CN-22), importation entities must submit their documentation to GAPP by February 15, and GAPP must complete all of its reviews by April 30).

function of the number of branches as a function of the number of legal entities approved as publication import entities.

37. In addition to the problems with the Panel’s reasoning described in the foregoing paragraphs, the United States does not understand the reasoning behind the Panel’s statements minimizing the restrictive impact of the State plan condition on those wishing to engage in importing reading materials. In the first place, it is unclear how the Panel could have assessed the restrictiveness of the State plan condition without specific information on the State plan itself. In the second place, the United States does not understand the reasoning behind the Panel’s statement that the State plan requirements “do not *a priori* exclude particular types of enterprise in China from establishing an import entity.”³⁵ While it may be true that the State plan condition (unlike the separate requirement of being a wholly state-owned enterprise) does not exclude particular *types* of enterprise from becoming importers – although of course, because China did not provide the contents of the State plan, it is impossible to know whether that is or is not the case – the State plan condition is nevertheless intended to limit the *number* of publication import entities. The State plan condition therefore appears to set a quota on the number of such entities, and such quotas are inherently restrictive.

38. In summary, while the United States supports much of the Panel’s analysis concerning China’s asserted Article XX(a) defense, there are significant flaws in the Panel’s specific analysis of the State plan condition in particular, and of how (or whether) its unwritten and unspecified limitation on the number of publication import entities contributes to China’s pursuit of its public

³⁵ Panel Report, para. 7.835.

morals objective. There is no reason to consider the State plan condition “necessary” within the meaning of Article XX(a); in terms of the framework outlined in *Korea – Various Measures Affecting Beef* and *U.S. – Gambling*, the limitations in the State plan condition are by no means closer to the “indispensable” pole than the “contribution” pole. The Panel thus misapplied Article XX(a) of the GATT 1994 in this particular finding (without prejudice to whether that Article is applicable or provides a defense for China in this dispute).

D. In the Alternative, the Panel’s Analysis of the State Plan Condition Did Not Constitute an Objective Assessment of the Matter

39. The United States considers that the flaws in the Panel’s analysis constitute misinterpretation and misapplication of Article XX(a) of the GATT 1994. However, to the extent that the Panel’s disregard of significant facts relating to the State plan condition (including its disregard of the fact that it did not know the contents of the State plan and therefore could not assess the plan) could be considered an error in the appreciation of evidence, its analysis of this issue would also fail to constitute an objective assessment of the matter and would thus be inconsistent with Article 11 of the DSU.

40. Article 11 of the DSU provides that “a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. . . .” The question as to whether a panel has made an “objective assessment” is a “*legal* one, that may be the subject of an appeal.”³⁶ In reviewing claims under Article 11, the Appellate Body also has stated that panels may not make

³⁶ Appellate Body Report, *U.S. – Wheat Gluten*, para. 151.

affirmative findings that “lack a basis in the evidence contained in the panel record,”³⁷ that “a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof,”³⁸ and that “[a] panel has a duty under Article 11 of the DSU to evaluate evidence in its totality, by which we mean the duty to weigh collectively all of the evidence and in relation to each other, even if no piece of evidence is by itself determinative of an asserted fact or claim.”³⁹

41. For the reasons set out in section III.C above, the Panel’s conclusion concerning the State plan condition did not result from a weighing of all of the evidence related to that condition in its totality and in relation to one another.⁴⁰ On that basis, the Panel’s analysis of the State plan condition failed to comply with Article 11 of the DSU.

IV. CONCLUSION

42. For the reasons set out above, the United States respectfully requests the Appellate Body to reverse the Panel’s intermediate finding that the State plan requirement in Article 42 of the

³⁷ Appellate Body Report, *U.S. – Carbon Steel*, para. 142.

³⁸ Appellate Body Report, *Korea – Dairy*, para. 137.

³⁹ Appellate Body Report, *U.S. – Continued Zeroing*, para. 336.

⁴⁰ For example, because China did not provide the State plan or explain its contents, the Panel reached a conclusion regarding whether the State plan was “necessary” without examining it. In addition, without examining the State plan, the Panel could not properly take account of the actual limit on the number of publication import entities in the State plan, nor assess whether that limit was justified. In fact, despite China’s assertions that the unspecified numerical limit on content reviewers for imported publications in the State plan was “necessary,” the Panel had evidence that Chinese publications were reviewed by a substantially greater number of content reviewers than imported publications. The Panel also failed to take account of the fact that the expansion of import locations and thus content reviewers throughout China contradicts China’s asserted rationale for limiting the number of publication import entities.

Publications Regulation can be characterized as “necessary” to protect public morals in China within the meaning of Article XX(a) of the GATT 1994 in the absence of reasonably available alternatives.

43. The United States notes that if the Appellate Body upholds the Panel’s findings⁴¹ on the proposed alternative measure that China has challenged in section 2.4 of its appeal, then instead of reversing the Panel, the Appellate Body could simply declare moot and of no legal effect the Panel’s conclusion that the State plan requirement in Article 42 of the Publications Regulation can be characterized as “necessary” to protect public morals in China within the meaning of Article XX(a) of the GATT 1994. This would be consistent with the views expressed in paragraphs 26 and 27 of this submission concerning avoidance of the confusion created by a two-step “necessary” analysis.

⁴¹ Panel Report, para. 7.908.